TABLE OF CONTENTS

	Page
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Argument	3
The Court Of Appeals Acted In Abuse Of Its Discretion By Denying Petitioner's Motion To Vacate Its Order Dismissing His Appeal And For Leave To Docket The Appeal And File The Record And Brief.	3
Conclusion	6

Index to Appendix

Order Denying Leave To Docket Appeal	A1
Notice Of Motion	A2
Affidavit of Barry Asness In Support	A3
Order Dismissing Appeal	A5
Notice of Appeal	A6
Minutes of Plea	A8

Cases Cited

Belton v. United States, 259 F.2d 811, 815 (D.C. Cir. 1958)	3
Christoffel v. United States, 190 F.2d 595, 590 (D.C. Cir. 1950)	4
Ellis v. United States, 356 U.S. 674 (1958)	4

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Page

Forte v. United States, 302 U.S. 220 (1937) 4

McCarthy v. United States, 394 U.S. 459 (1969) 6

Winter v. Crowley, 374 F.2d 317 (D.C. Cir. 1967) 4

Other Authorities

Fifth Amendment of the Constitution of the United States 4

Rule 11 of the Federal Rules of Criminal Procedure 4

Title 28, United States Code, Sections 1254(1) 2

IN THE
SUPREME COURT OF THE UNITED STATES
November Term, 1972

No.

LUIS DISLA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, LUIS DISLA prays that a Writ of Certiorari issue to review the determination of the United States Court of Appeals for the Second Circuit entered against him on September 12, 1972 denying his motions to vacate the order of this Court filed March 7, 1972, dismissing the appeal from the United States District Court for the Southern District of New York and for leave to docket the appeal and file the record.

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A.

The Court wrote no opinion.

B.

JURISDICTION

The jurisdiction of this Court is involved under Title 28, United States Code, Sections 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a final determination of denial of a motion to vacate an order dismissing the petitioner's appeal by the United States Court of Appeals for the Second Circuit.

C.

QUESTION PRESENTED

Whether the Court of Appeals acted in abuse of its discretion by denying petitioner's motion to vacate its order dismissing his appeal and for leave to docket the appeal and file the record and brief.

D.

STATEMENT OF THE CASE

The petitioner is 28 years of age, an alien, and had no previous criminal conviction. The petitioner was charged in Indictment No. 71 CR. 798 in five counts with distribution and possession with intent to distribute cocaine hydrocholride and conspiracy. On October 5, 1971 the petitioner entered pleas of

guilty to Counts 2 and 3 of the indictment. On November 18, 1971 he received sentences of 10 years imprisonment on each to run concurrently, plus a special parole terms of three years. On November 29, 1971 the petitioner's attorney filed a notice of appeal from the judgment of conviction. This appeal MS 5077, was dismissed on March 7, 1972 when petitioner failed to file his brief and appendix on March 6, 1972 as ordered.

Immediately after the imposition of sentence Petitioner made certain serious allegations against his attorney and they severed their relationship. The petitioner was therefore unrepresented by counsel from the time of the filing of the notice of appeal to after the dismissal of the appeal. Petitioner retained new counsel in August of 1972 and a determination was made that petitioner had meritorious grounds for appeal. Immediately a motion (Appendix A2) was made to vacate the order of the Court of Appeals filed March 7, 1972 (Appendix A5) dismissing the appeal from the United States District Court for the Southern District of New York and for leave to docket the appeal and file the record. The motion was denied (Appendix A1).

ARGUMENT

THE COURT OF APPEALS ACTED IN ABUSE OF ITS DISCRETION BY DENYING PETITIONER'S MOTION TO VACATE ITS ORDER DISMISSING HIS APPEAL AND FOR LEAVE TO DOCKET THE APPEAL AND FILE THE RECORD AND BRIEF.

The Court of Appeals for the Second Circuit acted in abuse of its discretion when it failed to consider the appeal by allowing the record to be docketed and filed late. *Belton v. United States,* 259 F.2d 811, 815 (D.C. Cir. 1958); *Winter v.*

Crowley, 374 F.2d 317 (D.C. Cir. 1967).

"The Supreme Court has on its account vested the United States Court of Appeals with discretion to consider and determine questions on appeal notwithstanding failure of counsel to make due compliance with usual procedural requirements. This discretion may be exercised either on application of a party or by the Court *sua sponte.*" *Christoffel v. United States*, 190 F.2d 595, 590 (D.C. Cir. 1950).

The Court of Appeals has been vested with full responsibility for the exercise of reasonable control over all the proceedings relating to the appeal and should act in the interest of justice. *Forte v. United States*, 302 U.S. 220 (1937). As long as the issues raised upon the appeal can not be characterized as frivolous, it should be held an abuse of discretion to dismiss an appeal especially when the appeal was dismissed while appellant was not represented by counsel. In an analogous situation a judgment of the Court of Appeals was vacated and the case remanded for reconsideration. *Ellis v. United States*, 356 U.S. 674 (1958). Although the petitioner entered a plea in this case, this alone does not indicate the matter is frivolous and without merit.

A reading of the minutes of plea attached hereto (see appendix) will sustain petitioner's position that his plea was taken in violation of the specific requirements of Rule 11 of the Federal Rules of Criminal Procedure, and therefore can not stand.

The basis for determining the validity of a conviction based upon a plea of guilty is the due process clause of the Fifth Amendment and the requirements of Rule 11 of the Federal

Rules of Criminal Procedure. Due Process requires that there be a knowing and intelligent waiver of certain Federal Constitutional rights necessarily waived by a plea of guilty and when this is not the case the plea of guilty should not be deemed to be voluntary.

Rule 11, designed also to ensure the voluntariness of a plea, is detailed in its requirement:

> "A defendant may plead not guilty, guilty or, with the consent of the Court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is *made voluntary with understanding of the nature of the charge* and the *consequences* of the plea. If a defendant refused to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."
>
> Rule 11, F.R.C.P.

Therefore, Rule 11 definitely requires that upon the entering of a plea of guilty 4 tests must be met. The Court must address the defendant personally and by so doing determine the following:

1. That the plea is voluntarily made,

2. That the plea is being made with an understanding of the nature of the charges;

3. That the plea is being made with an understanding of the consequences of the plea; and

4. That the court determine and satisfy itself that there is a

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factual basis for the plea which is being entered by the defendant.

In the case at hand, none of the requirements of Rule 11 or the due process clause were satisfactorily or sufficiently met in the acceptance of appellant Disla's plea.

Since the plea proceeding (see appendix) did not meet the requirements of Rule 11 as required by this Court by its opinion in *McCarthy v. United States*, 394 U.S. 459 (1969) the appeal in this case can not be said to be frivolous and therefore should be ordered reinstated in the Second Circuit for full and proper determination on its merits.

CONCLUSION

FOR THE REASONS HERE AND ABOVE SET FORTH THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

GOLDBERGER, ASNESS,
FELDMAN & BREITBART
Attorneys for Petitioner
LUIS DISLA

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of September, one thousand nine hundred and seventy-two.

United States of America,
Plaintiff-Appellee,

v.

Luis Disla,
Defendant-Appellant,

Girardo Daniel Perez Arano, Luis Perez,
Defendants.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated August 4, 1972 to vacate the order of this Court filed March 7, 1972, dismissing the appeal from the United States District Court for the Southern District of New York and for leave to docket the appeal and file the record be and hereby is denied.

s/Walter R. Mansfield, U.S.C.J.

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NOTICE OF MOTION

UNITED CSTATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-against-

LUIS DISLA

Appellant.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of BARRY ASNESS, duly sworn to the 4th day of August, 1972, and upon all other papers and proceedings heretofore had herein the undersigned will move this Court at the United States Courthouse Foley Square, New York on a date and time to be fixed by the Court for an order reinstating this appeal and granting counsel leave to docket the appeal out of time and for such other and further relief as to this Court may seem just and proper.

Yours etc.

Barry Asness
Attorney for Appellant

• • • •

To: Hon. Whitney North Seymour Jr.

• • • •

AFFIDAVIT OF BARRY ASNESS IN SUPPORT

(Same Title)

State of New York)
County of New York) SS.:
Southern District of New York)

BARRY ASNESS being duly sworn deposes and says:

I am counsel for the appellant herein and I make this affidavit in support of a motion for an order granting counsel leave to docket an appeal out of time.

The Appellant, Mr. Disla, is a man of 28 years of age with no previous criminal convictions who is also an alien although he has lived in the United States for 14 years and is married to a citizen and has a child. On October 5, 1971 while represented by other counsel, he plead guilty to two narcotics violations and on November 18, 1971 he was sentenced to 10 years on each count to run concurrently and 3 years special parole. He has been confined in the United States Penitentiary at Lewisberg, Pennsylvania since the date of sentence. His previous attorney filed a notice of appeal for the appellant on November 29, 1971 and no other action on this appeal by any attorney has since been taken. Consequently on March 7, 1972 the appeal was dismissed.

It must be noted that immediately after sentence Mr. Disla made certain allegations against his previous attorney and severed their relationship and has consequently been without legal counsel up until approximately one week ago when my firm agreed to review his situation.

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After careful review we verily believe that there are non-frivolous meritorious grounds for this appeal. The grounds for the appeal is basically that it was taken involuntarily under the Due Process Clause of the Constitution and in gross violation of Rule 11 of the Federal Code of Criminal Procedure in that the appellant was not informed of the possible maximum sentence, penalties, sanctions and consequence of his plea. Furthermore the Court did not properly determine whether he understood the nature of the charges against him or if there was a factual basis for the acceptance of his plea.

I submit that in determining whether to grant this motion the Court should consider all the above stated factors: the appellants lack of experience with criminal matters; his alien status; his poor relationship with his previous attorney; the fact that he was without legal counsel at the time the notice of appeal was filed and throughout the ensuing period up to date; and most importantly the existence of substantial and meritorious grounds for appeal.

WHEREFORE, it is respectfully requested that the Court grant counsel leave to docket this appeal out of time and for such other and further relief as to this Court may seem just and proper.

s/ Barry Asness

Sworn to before me this
day of August, 1972

ORDER DISMISSING APPEAL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of March, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge.

(Same Title)

An order having been entered herein on January 25, 1972, directing that the appellant shall file his brief and appendix to the brief on or before March 6, 1972, in default of which, the Clerk shall forthwith dismiss the appeal,

And said brief and appendix not having been so filed,

Upon consideration thereof, it is

Ordered that the appeal from the judgment of the United States District Court for the Southern District of New York be and it hereby is dismissed.

(A true copy,
(s/ A. Daniel Fusaro
(Clerk

A. DANIEL FUSARO,
Clerk

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LUIS DISLA,
Defendant-Appellant.

Name and address of Appellant, LUIS DISLA – 411 East 10th Street, New York City, New York.

Offense – Violation of Sections 812, 841(a)(1), 841(b)(1)(A), 960(a)(2) and 960(b)(1), Title 21, United States Code.

Appellant appeals from the judgment of conviction rendered against him on the 11th day of November, 1971, wherein he was sentenced to imprisonment for a term of ten years.

Appellant is presently confined in the United States Penitentiary at Lewisburg, Pennsylvania.

The above named appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above stated judgment, and from each and every part and the whole thereof does this appellant appeal.

Dated: November 29, 1971
New York, N.Y.

Herman I. Graber
Yours, etc.,
SIEGEL, GRABER & BOURGEOIS,
HERMAN I. GRABER, ESQ.
Attorney for Appellant,
401 Broadway,
New York City, N.Y. 10013

TO:
HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney, Southern District of N.Y.
United States Courthouse,
Foley Square, New York, N.Y.

Confined at:
Lewisburg, Pennsylvania
Federal Penitentiary.

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MINUTES OF PLEA

AFTERNOON SESSION

2:20 P.M.

MR. WALKER: Your Honor, in the Disla case, the counsel for Mr. Disla and Mr. Perez are still conferring with their clients with a view to a possible disposition. They were encouraging to me, when I came into the courtroom a few moments ago, about the prospect of there being a disposition short of trial. They would like to have about 10 or 15 more minutes to make a decision.

THE COURT: Take your time. I can come in at any time.

MR. WALKER: Thank you.

(Recess.)

THE CLERK: United States of America vs. Luis Disla and Luis Perez.

MR. WALKER: Your Honor, defense counsel for Mr. Disla and Mr. Perez have informed me that Mr. Disla wishes to withdraw his plea of not guilty as to Counts 2 and 3 of the indictment, and that Mr. Perez wishes to withdraw his plea of not guilty as to Count 2 of the indictment.

THE COURT: Disla to what?

MR. WALKER: Disla to 2 and 3, and Perez to 2.

THE COURT: I am sorry, 2 and 3?

MR. WALKER: Both defendants on the second count and Disla on the third count.

THE COURT: I see.

MR. GRABER: If your Honor please, that is a correct statement in regard to Mr. Disla. He would respectfully ask leave of this Court to be permitted to withdraw his heretofore plea of not guilty to the second and third counts of this indictment charging him with knowingly and unlawfully and wilfully distributing and possessing, with intent to distribute a schedule 2 narcotic drug, to wit, cocaine hydrochloride, and he wishes to withdraw that plea and now enter a plea of guilty to both counts, the 2nd and 3rd counts of this indictment.

THE COURT: All right. Thank you.

BY THE CLERK:

Q Luis Disla?

A Yes.

Q The second count of the indictment charges that "On or about the 27th day of May, 1971, in the Southern District of New York, you, Luis Disla, and Luis Perez, the defendants, unlawfully, wilfully and knowingly did distribute and possess, with intent to distribute, a Schedule 2 narcotic drug-controlled substance, to wit, approximately 28.04 grams of cocaine hydrochloride in violation of Title 21, U.S. Code, Section 812, 841(A)(1) and 841(B)(1) A."

Count 3 of the indictment charges: "On or about the 15th

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day of June, 1971, in the Southern District of New York, Luis Disla, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug-controlled substance, to wit, approximately 125.5 grams of cocaine hydrochloride in violation of Title 21, U.S. Code, Section 812, 841(A)(1) and 841(B)(1)A."

Do you understand the charge as read?

A Yes.

Q How do you plea to the charge?

A Guilty.

Q You wish to withdraw your plea of not guilty and you now plead guilty, is that what you are saying?

A Guilty.

MR. GRABER: I think there is just a matter of understanding.

(Counsel confers with his client.)

BY MR. GRABER:

Q Do you wish to withdraw your plea of not guilty?

A Yes.

Q And you now wish to plead guilty to Counts 3 and 2 of the indictment?

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A Yes.

Q Is that right?

A Yes.

BY THE COURT:

Q Mr. Disla, you are represented here by Mr. Graber, right?

A Yes.

Q If you don't understand any question which I ask you, ask me to repeat it. Be perfectly clear. Even if you are in court, just feel free to have me repeat the question if you don't understand.

How old are you?

A 28 years old.

Q Are you a married man?

A Yes, I am.

Q Do you have a family?

A Yes, I do, sir.

Q Are you a native of this country or Colombia?

A Alien.

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Q You are an alien?

A Yes.

Q You live in the United States?

A I live in the United States. I am an alien of the Dominican Republic.

Q Dominican?

A Correct.

Q Where were you educated? Where did you go to school?

A When I first came to the country.

Q When you first came to the country you went to school in this country?

A In this country.

Q Did you go to school in the Dominican Republic?

A Yes, I did.

Q And then you went to school here after you came to this country?

A Yes, I did.

Q How far did you get along in school, what grade?

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A About one year I went to school.

Q One year in high school?

A Yes. It was mostly for the purpose of learning the language.

Q I see. Have you been employed gainfully since you have been in this country?

A Yes, I have.

Q You understand we have given you a lot of time to discuss this matter with your lawyer?

A Yes.

Q I don't know what you said to him and I don't know what he said to you, but you understand that by your plea of guilty to these counts, these two counts of the indictment, that that has the same legal effect as if you had been found guilty by a jury, do you understand that?

A Yes, sir, I do.

Q Do you understand that under our system of jurisprudence that you are presumed innocent until found guilty, do you understand that?

A Yes, sir.

Q Do you understand you have a constitutional right to have a trial by a jury?

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A Yes, I do.

Q Now, by having the same legal effect, do you understand that the same sentence could be imposed as could be imposed had you been found guilty by a jury?

A Yes, sir.

Q What did Mr. Graber tell you that sentence would be?

A Anything up to 15 years.

Q That's right, ranging up to 15 years, and a $25,000 fine.

A Correct.

Q Or both. But there is also a mandatory provision of the statute which requires that after this sentence is imposed that you have to have three years of probation. That would be not incarcerated. Did anyone make any promise to you to induce you to enter this plea?

A None.

Q Did anybody make any threat?

A No, sir.

MR. WALKER: Your Honor, might I ask the Court to remind this defendant that the 15 years is one each of the counts to which he is pleading guilty.

MR. GRABER: He has been so informed, your Honor, be

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me.

Q Well, you understand that 15 years could be on each count?

A Yes.

Q I merely tell you that and the other punishment likewise, on each count.

You have heard the charges that were read by Mr. Garvey, the clerk of the Court, and that is – and I am repeating, that on the 27th day of May, 1971, that is this year, in this District, you and Luis Perez unlawfully, wilfully and knowingly did distribute and possess, with intent to distribute, a narcotic drug-controlled substance, approximately 28.04 grams of cocaine hydrochloride.

Do you understand that charge?

A Yes, I do.

Q Is that what you did?

A Yes.

Q Did you do that? And on the third count, it was on the 15th day of June that you, you alone, did unlawfully, wilfully and knowingly distribute and possess, with intent to distribute, a narcotic drug-controlled substance approximately 125.5 grams of cocaine hydrochloride. Do you understand that?

A Yes.

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Q And you are pleading guilty to that?

A Yes.

THE COURT: Is there anything else I should know, Mr. Walker? Anything else I should know, Mr. Graber?

MR. WALKER: I believe that covers it, your Honor.

MR. GRABER: No, your Honor, I think that covers it.

THE COURT: I intend to cover it very carefully.

We will accept the plea. I assume we need a presentence report here before sentence is imposed.

MR. GRABER: Yes, your Honor.

THE COURT: What about bail?

MR. WALKER: Your Honor, the Government –

THE COURT: $15,000 bail, $1500 cash deposit, personal recognition bond.

MR. WALKER: Your Honor, the Government is of the

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-721

LUIS DISLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A five-count indictment returned in the United States District Court for the Southern District of New York charged petitioner and two others with having distributed and possessed cocaine hydrocloride with intent to distribute it and with having conspired to do so, in violation of 21 U.S.C. 841 and 846.

On July 30, 1971, petitioner and the two co-defendants entered pleas of not guilty. On October 5, 1971, following a hearing, petitioner's motion to suppress was denied. Later the same day, while represented by retained counsel, petitioner changed his plea to guilty

on two of the susbstantive counts (Pet. App. A8-A16).[1] At that time, the trial judge questioned petitioner as to his understanding of the charges and the constitutional rights he was waiving by pleading guilty (T. 15-16). Petitioner stated that he understood the charges and his rights. He was also questioned about the maximum penalty and indicated his awareness that a fifteen-year sentence could be imposed on each of the counts as well as an additional three-year term of probation (T. 16-17). Petitioner in addition stated that no promises had been made to him, and admitted having done the acts which formed the basis of the charges (T. 17-18). His plea was then accepted and sentencing was deferred so that a pre-sentence report could be prepared.

On November 18, 1971, petitioner was sentenced to concurrent terms of ten years' imprisonment on each of the two counts and a special parole term of three years. On November 29, 1971, petitioner's attorney filed a notice of appeal from the judgment of conviction (Pet. App. A6-A7).[2] On January 25, 1972, petitioner was then ordered to file his brief in the court of appeals on or before March 6, 1972, failing which his appeal would be dismissed.[3] On March 7, 1972, the court

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[1] The two co-defendants also changed their pleas to guilty.

[2] Petitioner asserts that almost immediately after his counsel filed the notice of appeal a dispute arose between them and that petitioner severed their relationship.

[3] On February 14, 1972, petitioner filed a motion to withdraw his plea of guilty and to vacate sentence pursuant to 28 U.S.C. 2255, alleging that his counsel had coerced him to change his plea of "not guilty" to "guilty" through the promise of a suspended sentence. On May 5, 1972, petitioner's trial counsel filed an affidavit

of appeals dismissed the appeal due to petitioner's failure to file his brief by the day specified (Pet. App. A5).

On August 4, 1972, petitioner, through newly retained counsel, filed a motion to vacate the order dismissing the appeal. He asserted that the grounds for appeal were that his plea was not voluntary and that the trial judge had not complied with Rule 11, Fed.R. Crim.P. (Pet. App. A2-A4). The court of appeals denied the motion (Pet. App. A1), and it is that denial that petitioner now asks this Court to review.

Whether to reinstate an appeal after a party has failed to comply with procedural requirements is a matter within the sound discretion of the court. See, *e.g., United States* v. *Lynch,* 419 F. 2d 386 (C.A. 4); Rule 31(c), Fed.R.App.P. In the instant case, the court did not abuse its discretion in declining to reinstate the appeal since petitioner had ample time in which to retain new counsel and file his brief between his discharge of his original counsel and the date set for filing the brief. Moreover the record—set forth at pp. A8-A16 of the petition—shows that the district judge carefully complied with all of the requirements of Rule 11 before he accepted the guilty plea.[4]

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denying the existence of any such promise. The district court denied the motion and an appeal is now pending before the Second Circuit, No. 72-1678.

[4] Insofar as this claim rests on the allegation that his counsel had promised him a suspended sentence, petitioner's appeal from the denial of his motion to vacate sentence on that ground is, as we have noted, presently before the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

☆ U.S. Government Printing Office: 1973—492-116/407

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